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Supreme Court, U.S.
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No. 91-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

R. Ernest **COHN**, D.C., D.A.B.C.O.,
Petitioner,

v.

John L. **BOND**, M.D., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the private medical doctor ("M.D.") credentialing staff of a state-chartered municipal hospital, who combined to exclude competing chiropractors from hospital privileges in violation of Sherman Act §§ 1 & 2 and Clayton Act § 16, are immune from antitrust liability under the Local Government Antitrust Act and/or the state action doctrine of *Parker v. Brown*, where the relevant "clearly articulated state policy" set forth in North Carolina statutes expressly *permits chiropractors to practice in public hospitals* (and *requires* chiropractor admittance upon the request of a hospital patient), but where the Court of Appeals' antitrust immunity analysis completely ignored the North Carolina Chiropractor Hospital Access Statutes and instead relied upon an irrelevant state statute (not even applicable to chiropractors) which only authorizes public hospitals to grant or deny privileges to M.D.'s, dentists, and podiatrists.

2. Whether the doctrine of intracorporate immunity (*see Copperweld Corp. v. Independence Tube Corp.*) may be extended to insulate from antitrust liability all hospital M.D. credentialing staff members who as independent economic entities privately conspire to exclude from hospital privileges an entire class of directly competing and lower cost non-M.D. health providers (i.e., chiropractors, nurse midwifes, etc.), under the theory that such private M.D. competitors

are acting merely as "employees" or "agents" of the hospital.

PARTIES TO THE PROCEEDING

Petitioner R. Ernest Cohn, D.C., D.A.B.C.O., the plaintiff in the District Court and appellant in the Court of Appeals, is a licensed chiropractor who maintains a practice in Wilkesboro (Wilkes County), N.C. Petitioner is not a corporation (*see* Rule 28.1).

Respondents, the defendants in the District Court and appellees in the Court of Appeals, are John L. Bond, M.D., John Bennett, M.D., Larry S. Kilby, M.D., Karolen C. Bowman, M.D., Donald D. Peterson, M.D., Kirk D. Gulden, M.D., John G. Oliver, M.D., James K. Hartye, M.D., Thomas K. McMahan, M.D., Leonard R. Baugham, M.D., Mark D. Andrews, MD., J. Thomas Bowman, M.D., Duane H. Smith, M.D., and Jerry F. Watson, M.D. During the relevant period respondents were medical doctors engaged in private for-profit practice in Wilkes County, N.C. and were at various times members of the staff Credentials and/or Executive Committees of Wilkes General Hospital, a municipal hospital chartered under the laws of North Carolina and the only hospital located in Wilkes County. Respondent Bond also served on the Wilkes Board of Trustees.

Other Board members and the Hospital were originally named but were dropped as co-defendants in the District Court after this Court's decision in *Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344 (1991).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals (App. A, *infra* at 1a-13a) is reported as *Cohn v. Bond*, 953 F.2d 154 (4th Cir. 1991). The opinion and judgment of the District Court, *Cohn v. Wilkes General Hospital*, 767 F. Supp. 111 (W.D.N.C. 1991), is reproduced in App. B, *infra* at 14a-24a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 31, 1991, and reaffirmed by the denial of

a timely filed petition for rehearing with suggestion for rehearing *en banc* on February 10, 1992 (25a-26a). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AT ISSUE

The Sherman Act §§ 1 & 2, 15 U.S.C. §§ 1 & 2, provide:

> (1) Every contract, combination ..., or conspiracy in restraint of trade or commerce among the several states ... is declared to be illegal", and
>
> (2) Every person who shall monopolize, or attempt to monopolize, or combine or conspire ... to monopolize ... shall be deemed guilty of a felony.[1]

The Clayton Act § 16, 15 U.S.C. § 26, provides:

> Any person ... shall be entitled to sue for and have injunctive relief ... against threatened loss or damage by a violation of the antitrust laws....

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[1]The Clayton Act, 15 U.S.C. § 15(a), creates a private civil damage cause of action for violations of Sherman Act §§ 1 or 2.

The Local Government Antitrust Act, 15 U.S.C. § 36(a), provides:

> No damages, interest on damages, costs or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act ... in any claim against a person based on any official action directed by a local government, or official or employee thereof acting in an official capacity.

STATEMENT OF THE CASE

Chiropractors are a group of health practitioners who treat certain musculoskeletal disorders, principally lower back pain (one of the most common physical ailments in this country, afflicting at least one in seven Americans annually), through a method known as "spinal manipulation". Chiropractors have their own educational and training institutions and state licensing requirements, which are separate from those of medical doctors ("M.D.s"). However, M.D.s (e.g., orthopedists, neurosurgeons, family practitioners) also treat musculoskeletal disorders, including lower back pain, and in doing so substantially compete with chiropractors.

M.D.s through their American Medical Association have been found to have conspired for decades to boycott the competing chiropractic profession, in violation of the antitrust laws. *Wilk v. American*

Medical Ass'n, 719 F.2d 207 (7th Cir. 1983), *on remand*, 671 F. Supp. 671 (N.D. Ill. 1987), *aff'd*, 895 F.2d 322 (7th Cir. 1990), *cert. denied*, 111 U.S. 513 (1990). A significant and growing body of scientific evidence now suggests that chiropractic treatment of certain types of lower back pain may be as or more efficacious, involving reduced expense and shorter hospital stays, than M.D. treatment,[2] potentially saving billions of dollars per year in health costs.

Encouraged by the growing evidence of efficacy and the favorable initial Seventh Circuit decision in *Wilk*, petitioner, a licensed chiropractor practicing in Wilkes County, North Carolina, applied for in-patient and/or out-patient privileges at Wilkes General Hospital ("Wilkes" or the "Hospital") on several occasions between 1984 and 1988. Wilkes, a state-chartered "public" or "municipal" facility, is the only hospital

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[2]Recent studies include Meade *et al.*, "Low Back Pain of Mechanical Origin: Randomized Comparison of Chiropractic and Hospital Outpatient Treatment," 300 *British Med. J.* 1430 (1990); Waagen *et al.*, "A Prospective Comparative Trial of General Practice Medical Care, Chiropractic Manipulative Therapy and Sham Manipulation in the Management of Patients with Chronic or Repetitive Low Back Pain," Conf. Materials Submitted at Meeting of Int'l Society for the Study of the Lumbar Spine, June 13-17, 1990, Boston, Mass. ("both family practice and chiropractic care have the ability to reduce impairment and the expression of pain in patients with chronic and recurrent low back pain. However, only chiropractic manipulative care showed significant improvement when compared with a control sham manipulation group."); Shekelle, *et al.*, *The Appropriateness of Spinal Manipulation for Low-Back Pain* (Rand Corp. 1991).

located in Wilkes County, which was never disputed as the relevant geographic market for antitrust purposes.

Petitioner's application was referred, pursuant to the Wilkes bylaws, to the medical staff Credentials and Executive Committees. As in the typical hospital, these Committees consisted of various physicians, all of them M.D.s, who maintained private for-profit medical practices in the vicinity and had already obtained hospital admitting privileges for their own patients.[3] These Committee members included the respondents, virtually all of whom competed with petitioner and other chiropractors in diagnosing, treating, and/or referring patients with musculoskeletal disorders.

Utilizing their memberships on these staff M.D. Committees, respondents conspired or combined to deny petitioner any of the requested hospital privileges.[4] Understanding that the Wilkes Board of

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[3]*See generally* Havighurst, "Doctors and Hospitals: An Antitrust Perspective on Traditional Relationships," 1984 *Duke L.J.* 1071.

[4]In applying for in-hospital privileges (e.g., manipulation under sedation, intersegmental traction, bed rest, emergency room treatment of accident victims), petitioner understood that his patients would have to be co-admitted by a staff M.D. who would be responsible for any medical (not chiropractic) needs of the patient. N.C. Gen. Stats. § 131E-86(a). In applying for out-patient privileges (x-rays, lab tests, physical therapy), petitioner did not seek to treat his patients in the hospital but to have them utilize existing hospital facilities, particularly the radiology department. Over the years petitioner had lost hundreds of Medicare patients (and hundreds of thousands of dollars in revenue) who could not afford or were unwilling to pay for their own x-rays. Medicare reimburses for such chiropractic treatment, but only if an M.D. or Osteopath agrees to perform an x-ray and confirms that a subluxation exists (for which the

(footnote continued on next page)

Trustees relied upon and routinely ratified their medical judgments regarding hospital privileges, respondents concocted and forwarded to the Board a series of sham pretexts as to why admission of *any* chiropractor (not just petitioner personally) would "lower the quality of patient care" at the hospital—the same basic rationale found in *Wilk* to be unsupported by the scientific/medical evidence.[5] The Board's

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M.D radiologist can be directly reimbursed by Medicare). A chiropractor such as petitioner cannot be reimbursed by Medicare for his own x-rays. *See* 42 U.S.C. § 1861(s) and 42 C.F.R. § 410.22(b)(2). The Wilkes radiology department (respondent Bennett, M.D.) refused to perform and interpret x-rays for petitioner's patients because he lacked out-patient privileges. His application for out-patient privileges was denied because he lacked in-patient privileges. Consequently, many of petitioners' potential patients suffering from lower back pain instead went to M.D.s for treatment, because all of those costs, including x-rays, would be covered by Medicare.

[5]Respondents claimed that the quality of patient care would deteriorate because (1) the M.D.s and other hospital staff, being unfamiliar with the tenets of chiropractic, would be unable to monitor petitioner's work (though since *Wilk* dozens of other hospitals have admitted chiropractors without incident), (2) despite the North Carolina Chiropractor Hospital Access statutes (*see infra* at 9-10), Wilkes General should not have to be the *first* North Carolina hospital to admit a chiropractor, (3) the Hospital might incur malpractice liabilities (though petitioner had his own ample malpractice insurance), (4) the Hospital might receive complaints from patients about chiropractor "billing practices" with which the Hospital was unfamiliar (though most chiropractic care, like ordinary medical care, is paid for by health insurance companies), (5) petitioner might not agree to abide by statutory co-admitting requirements (simply not true), and (6) no member of the Hospital Board of Trustees had *personally* received a request that the Hospital provide chiropractic services. Petitioner was prepared to

(footnote continued on next page)

ratification of this adverse recommendation represented the first time in its Chairman's 13 year tenure that any Hospital privileges applicant had been rejected.

This elaborate sham became necessary when, during their deliberations, the respondents learned to their surprise and consternation that state law did not make it so easy for public hospitals to deny chiropractors privileges. State law gave public hospitals virtually unfettered discretion to grant or deny privileges to M.D.s, dentists, and podiatrists. N.C. Gen. Stats. § 131E-85(a) provided:

> The granting or denial of privileges to practice in hospitals to *physicians* licensed under Chapter 90 of the General Statutes, Article 1 [i.e., M.D.s], *dentists* and *podiatrists* and the scope and delineation of such privileges shall be determined by the governing body of the hospital. Such determinations shall be based upon the applicant's education, training, experience, demonstrated competence and ability, and judgment and character of the applicant, and the reasonable objectives and regulations of the hospital, including,

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demonstrate with evidence that each of these were sham pretexts. *Compare Bolt v. Halifax Hosp. Med. Center*, 891 F.2d 810, 819-823, 826-828 (11th Cir.), *cert. denied*, 495 U.S. 924 (1990). Neither the District Court nor the Court of Appeals reached or resolved these factual issues raised by respondents' summary judgment motions.

> but not limited to appropriate utilization of hospital facilities, in which privileges are sought ... [emphasis added].

As respondents' counsel no doubt advised, the foreseeable anticompetitive effects of this state regulatory policy were sufficient to immunize public hospitals from antitrust liability in access cases involving *M.D.s*, *dentists*, and *podiatrists*, as was subsequently held by the Fourth Circuit in its *Coastal* and *Sandcrest* decisions.[6] But during respondents' deliberations on whether to recommend granting or denying petitioner privileges, respondent Kilby, M.D., Chairman of the Hospital's Medical Executive Committee, lamented that "[n]o other discipline is mentioned" in N.C. Gen. Stat. § 131E-85(a). Dr. Kilby explained:

> However, Chapter 90 of the General Statutes, which is the law on medicine and allied occupations, contains a statute which says that a licensed chiropractor may have access to and practice chiropractic in a public hospital. This law has been on the books since 1919 but apparently is ignored when the hospital law is updated

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[6]*Coastal Neuro-Psychiatric Associates, P.A. v. Onslow Mem. Hosp.*, 795 F.2d 340, 341-342 (4th Cir. 1986); *Sandcrest Outpatient Servs., P.A. v. Cumberland County Hosp.*, 853 F.2d 1139 (4th Cir. 1988).

> from time to time. Recently the Institute of Government in Chapel Hill published a new book on North Carolina hospital law, ... [which] devoted an entire chapter to staff privileges, but completely omitted any reference to this law on chiropractors.

The North Carolina Chiropractor Hospital Access statutes to which Dr. Kilby referred were:

> § 90-153. Licensed chiropractors may practice in public hospitals.
>
> A licensed chiropractor in this State *may* have access to and practice chiropractic in any hospital or sanitarium in this State that receives aid or support from the public, and *shall* have access to diagnostic x-ray records and laboratory records relating to the chiropractor's patient [emphasis added].

And:

> § 90-157.1. Free choice by patient guaranteed.
>
> *No* agency of the State, *county or municipality*, nor any commission or clinic, *nor any board administering ... health service* under the laws of ... North

> Carolina *shall deny* to the recipients or beneficiaries of their aid or services *the freedom to choose a duly licensed chiropractor as the provider of care or services* which are within the scope of practice of the profession of chiropractic as defined in this Chapter [emphasis added].

Although § 90-153 uses the term that chiropractors *may* have access to and practice in public hospitals, indicating that no hospital must admit *every* chiropractor, when read together with § 90-157.1 that any public hospital patient *shall* have the right to be attended by a chiropractor, the conclusion is inescapable that any public hospital upon request must admit at least *one* chiropractor to its staff at some point. This clearly articulated state policy is further borne out by the North Carolina legislature's *rejection* in 1977 of an amendment that would have added: "The provisions of this section shall not be deemed to require the admission of any chiropractor as a staff member of any hospital or medical institution."

Nonetheless, petitioner's case was dismissed, in both the District Court and the Court of Appeals, on the ground that the private M.D. respondents were acting pursuant to a clearly articulated state policy to supplant competition—i.e., the inapplicable N.C. Gen. Stats. § 131E-85(a)—and therefore were immune from antitrust liability under the LGAA (damages) and the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943) (injunctive relief). Although petitioner argued

in dozens of briefs before both of these courts that the relevant "clearly articulated state policy" was not the inapplicable § 131E-85(a), but was instead the North Carolina Chiropractor Hospital Access statutes, both courts simply stonewalled the issue.

In their antitrust analyses neither court even *mentioned* the North Carolina Chiropractor Hospital Access statutes, much less explained why § 131E-85(a), instead of the Chiropractor Hospital Access statutes, controlled the issue of state action antitrust immunity. (6a-10a, 16a-19a.) Respondents similarly maintained consistent silence on this fundamental issue throughout the litigation until pressed to respond by the Fourth Circuit at oral argument, when respondents' counsel answered feebly that "legislative drafting is not perfect". Yet the North Carolina legislature had made crystal clear its pro-competitive policy of granting chiropractors access to public hospitals—until the Fourth Circuit judicially repealed that legislative policy *sub silentio.*

While this appeal was being briefed, the Fourth Circuit decided *Oksanen v. Page Memorial Hospital*, 945 F.2d 696 (4th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 973 (1992), exonerating staff M.D. defendants in revoking the private hospital privileges of another *non-competing* M.D. In *Oksanen*, the Fourth Circuit reasoned that under a "functional analysis" mandated by *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771-772 (1984), the intracorporate conspiracy doctrine applied to require that those private M.D. defendants be treated as "employees" or "agents" of the hospital for purposes of

making staff peer review decisions. 945 F.2d at 702-704.

But the Fourth Circuit reached that result only after finding through careful examination that none of the private M.D. defendants there actually *competed* with Dr. Oksanen. While refusing "to cloak in federal antitrust law what is in essence a workplace dispute", the Fourth Circuit reaffirmed the general antitrust principle that "medical staff ... physicians with independent and at times competing economic interests ... have the capacity to conspire as a matter of law." 945 F.2d at 699, 705-706.

In deciding the present case, however, the Fourth Circuit has extended *Oksanen* to immunize exclusionary hospital practices of private staff M.D.s having separate economic practices that indisputably *do compete* with petitioner. The Fourth Circuit has now magnified the intracorporate conspiracy doctrine far beyond what was contemplated in *Copperweld*, to allow independent competitors to conspire to exclude competition at virtually any gate-keeping bottleneck in the economic system.

Compounding that error, after rejecting petitioner's Sherman Act § 1 claims under the intracorporate conspiracy doctrine, the Fourth Circuit declined in this case to then consider, as it did in *Oksanen*, 945 F.2d at 709-710, whether the private defendants had nonetheless monopolized hospital services in the relevant geographic market, to exclude chiropractors in violation of Sherman Act § 2. Unlike in *Oksanen*, where there were competing hospitals in the relevant market (at one of which Dr. Oksanen retained

privileges after his ouster from Page Memorial), in this case Wilkes General was the only hospital in the relevant geographic market to which chiropractors and their patients could have had access.[7]

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[7]If petitioner prevails on the antitrust immunity issue but not on the intracorporate conspiracy issue, this Court should remand for consideration of the § 2 claims. The private staff M.D. respondents had a monopoly over advising hospital trustees on privilege decisions, and assuming that monopoly power was legally acquired, it was abusively maintained by the exclusion of chiropractors. Remand would also be appropriate for the Fourth Circuit to reach and consider a new federal "peer review" discovery privilege created by the District Court. *See Cohn v. Wilkes Gen. Hosp.*, 127 F.R.D. 117, 119-121 (W.D.N.C. 1989) (reaffirmed at 16a). The effect of the Fourth Circuit's failure to reach this issue, given its disposition below (11a-12a), is to let stand a new federal discovery privilege unanimously rejected by every other court. *See, e.g., Memorial Hosp. for McHenry County v. Shadur*, 664 F.2d 1058, 1063 (7th Cir. 1981); *Wei v. Bodner*, 127 F.R.D. 91, 94-95, 98-99 (D.N.J. 1989); *Jiricko v. Coffeyville Mem. Hosp. Med. Center*, 700 F. Supp. 1559, 1564 (D. Kan. 1988); *Quinn v. Kent Gen. Hosp.*, 617 F. Supp. 1226, 1244-1246 (D. Del. 1985); *Robinson v. Magovern*, 83 F.R.D. 79, 89 (W.D. Pa. 1979); *Feminist Women's Health Center, Inc. v. Mohammed, M.D.*, 586 F.2d 530, 544n.9 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979); *Pinkard v. Johnson*, 118 F.R.D. 517, 520 (M.D. Ala. 1987); *Ott v. St. Luke Hosp. of Campbell County*, 522 F. Supp. 706, 711 (E.D. Ky. 1981); *Schafer v. Parkview Mem. Hosp., Inc.*, 593 F. Supp. 61, 65 (W.D. Ind. 1984); *Dorsten v. Lapeer County Gen. Hosp.*, 88 F.R.D. 583, 586 (E.D. Mich. 1980). In creating its new "peer review" discovery privilege, the District Court erroneously relied, in part, on the inapplicable Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101 *et seq. See Summit Health Ltd. v. Pinhas*, 111 S. Ct. 1842, 1848n.12 (1991); *Tambone v. Memorial Hosp. for McHenry County, Inc.*, 825 F.2d 1132, 1135n.2 (7th Cir. 1987); *Wei supra*, 127 F.R.D. at 99-100.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S DECISION CREATES A CLEAR CONFLICT AMONG THE CIRCUITS, BY EXTENDING "STATE ACTION" ANTITRUST IMMUNITY FROM ANTICOMPETITIVE ACTIVITIES CONTEMPLATED BY A "CLEARLY ARTICULATED STATE POLICY" TO THOSE EXPRESSLY PROHIBITED BY THE RELEVANT STATE STATUTE

Since *Parker v. Brown*, 317 U.S. 341 (1943), state regulatory action having anticompetitive effects has been immune from the federal antitrust laws only to the extent consistent with a "clear articulation of a state policy to authorize anticompetitive conduct." In subsequent decisions, and as codified (at least for damage liability) in the Local Government Antitrust Act of 1984, 15 U.S.C. § 34 *et seq.*, the *Parker* immunity doctrine has been extended to municipalities acting pursuant to state authorization, including private persons carrying out the municipal policy. *See Capital Freight Services, Inc. v. Trailer Marine Transport Corp.*, 704 F. Supp. 1190, 1201 (S.D.N.Y. 1989).

In recent years, considerations of federalism have caused the "clearly articulated state policy" doctrine to be construed liberally so as to enlarge the scope of governmental antitrust immunity. The state policy to suppress competition need not be explicit—i.e., need not expressly endorse particular regulatory actions distorting otherwise free market outcomes for particular economic activities—as long as the

anticompetitive impact is a "foreseeable result" of the state's general policy. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42-44 (1985). And as long as there is state authorization, immunity persists even though municipalities or subordinates may exercise the authority erroneously, improperly, or even illegally. *Columbia v. Omni Outdoor Advertising, Inc.*, 111. S. Ct. 1344, 1349-1350 (1991).

Exactly where the line may be drawn between state authorization and non-authorization in a particular case is not the issue here. The North Carolina legislature drew the line clearly, only to have it erased by the Fourth Circuit. The legislature in N.C.G.S. § 131E-85(a) clothed public hospitals with broad discretion to grant or deny privileges to M.D.s, dentists, and podiatrists, but limited that authority through the separate Chiropractor Hospital Access statutes (N.C.G.S. §§ 90-153 & 90-157.1), expressly mandating access to public hospitals by chiropractors and their patients. Thus, the North Carolina legislature was not merely silent or neutral about chiropractor hospital access, which would have been enough for petitioner under *Community Communications Co. v. Boulder*, 455 U.S. 40, 55 (1982), but *affirmatively prohibited* the exclusionary practices challenged.

Until the Fourth Circuit's decision, judicial precedent was virtually unanimous that a state statute authorizing regulation to supplant competition applies only as far as the statute authorizes, and no further. *See, e.g., Lancaster Community Hospital v. Antelope Valley Hospital Dist.*, 940 F.2d 397, 400-404 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1168 (1992) (mere state

authorization for public hospitals to "do business" did not override other pro-competitive state policies). *See also, e.g., Wall v. City of Athens*, 663 F. Supp. 747, 759-760 (M.D. Ga. 1987) (state policy permitting municipal monopolies over county water services did not extend to city's price discrimination practices); *Hart Productions, Inc. v. Greater Cincinnati Convention and Visitors Bureau*, 1990-2 Trade Cas. (CCH) ¶ 69,233 (S.D. Ohio) (statutes authorizing municipalities to levy lodging taxes to establish local convention centers "do not express a clear state policy to displace competition for the leasing of convention center space," *citing Cincinnati Riverfront Coliseum, Inc. v. Cincinnati*, 556 F. Supp. 664, 668 (S.D. Ohio 1983); *New York Citizens Comm. on Cable TV v. Manhattan Cable TV, Inc.*, 651 F. Supp. 802, 808-810 (S.D.N.Y. 1986) (grant of exclusive cable TV franchise did not authorize foreclosure of competition in programming services); *Bloom v. Hennepin County*, 783 F. Supp. 418 (D. Minn. 1992) (statute authorizing government entities to contract for provision of medical services would not immunize participation in market allocation scheme).[8]

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[8]The pro-chiropractor statutes on which petitioner relies are unique to North Carolina and are in stark contrast with the blanket statutory antitrust immunity afforded public hospital staff privilege denials in some other states. In Georgia, for example, hospitals are authorized to revoke privileges for *any* reason. *See Sweeney v. Athens Regional Med. Center*, 709 F. Supp. 1563 (M.D. Ga. 1989). In Alabama a hospital is given enumerated powers "notwithstanding that as a consequence of such exercise of such powers it engages in activities that may be deemed 'anticompetitive' within the contemplation of the antitrust laws." *See*

(footnote continued on next page)

Although this principle seems as self-evident as the more general proposition that there either is or is not a state policy conferring antitrust immunity, the Fourth Circuit's error is magnified by the existence of *contrary* state hospital access statutes specifically enacted for the benefit of chiropractors and their patients. Through extensive briefing and oral argument, the courts below were fully aware of N.C.G.S. §§ 90-153 & 90-157.1, but ignored them. Respondents below likewise relied exclusively on N.C.G.S. § 131E-85(a), although it does not even apply to chiropractors, and the principal case construing it, *Coastal Neuro-Psychiatric Assocs. v. Onslow Memorial Hospital, Inc.*, 795 F.2d 340, 341 (4th Cir. 1986), as explained by the Fourth Circuit in this case, related only to "a municipal hospital's power to decide which *physicians* [i.e., M.D.s] are entitled to privileges."[9]

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Griffith v. Health Care Auth. of City of Huntsville, 705 F. Supp. 1489, 1505 (N.D. Ala. 1989). Through the democratic process, chiropractors were able to persuade the North Carolina legislature otherwise, but the Fourth Circuit has judicially repealed, for antitrust purposes, the public hospital access that the North Carolina legislature clearly sought to afford chiropractors.

[9] 10a (emphasis added). The Fourth Circuit seemingly relied upon N.C.G.S. §§ 131E-7(a)(6) (allowing municipalities to establish hospital fee schedules) and 131E-5 (allowing municipalities to construct, operate, and maintain hospitals), 10a, but these provisions reflect no "clearly articulated state policy" regarding hospital *privileges*, the subject to which § 131E-85(a), in the case of M.D.s, and §§ 90-153 & 90-157.1, in the case of chiropractors, are *specifically* directed. It would make no sense for a court to rely upon extremely general language (e.g., the § 131E-5

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II. BY ITS RADICAL EXTENSION OF THE INTRACORPORATE CONSPIRACY DOCTRINE AS AN ANTITRUST DEFENSE, THE FOURTH CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH THOSE OF ALL OTHER CIRCUITS AND THIS COURT

Until this decision, *every* other Circuit addressing the issue, including the Fourth Circuit in *Oksanen*, has held that private M.D.s controlling hospital privileges decisions are "independent economic entities" who can "conspire", for Sherman Act § 1 purposes, at least where the private M.D.s *are in direct economic competition with the excluded applicant.*[10]

(footnote continued from previous page)
authorization of municipalities to "operate" public hospitals) as a basis for ignoring more *specific* statutes, such as the Chiropractor Hospital Access Statutes, telling municipalities *how* they must operate their hospitals. Yet this is exactly what the Fourth Circuit has done. This case never involved any request by petitioner that Wilkes General expand or alter its facilities to accommodate him (e.g., by building a "chiropractic wing") or any claim by Wilkes General, which operates with one-third of its beds empty, that it lacked the physical facilities to accommodate a staff chiropractor who would actually increase hospital revenues.

[10]*See, e.g., Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1446n.1 (11th Cir. 1991); *Bolt supra*, 891 F.2d at 819; *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1450 (9th Cir. 1988); *Weiss v. York Hosp.*, 745 F.2d 786, 814-817 (3d Cir. 1984), *cert. denied sub nom. Medical and Dental Staff v. Weiss*, 470 U.S. 1060 (1985); *Cooper v. Forsyth County Hosp. Auth.*, 789 F.2d 278, 282 (4th Cir. 1986) (Motz, J, concurring); *Pudlo v. Adamski*, 1992-1 Trade Cas. (CCH) ¶ 69,764 (N.D. Ill.). The many hospital staff conspiracy to exclude competitor cases include *Summit Health, Ltd. supra*, 111 S. Ct. at 1845-

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The two other Circuit decisions on which *Oksanen* relied likewise held that only *non-competitors* with the excluded doctor were "agents" or "employees" of the hospital for peer review purposes, and thus protected from § 1 "conspiracy" allegations by the intracorporate immunity doctrine. But both decisions reaffirmed that M.D. *competitors* with the excluded doctor had a sufficient "independent stake" to make them independent economic operators capable of conspiring.

Nurse Midwifery Assocs. v. Hibbett, 918 F.2d 605, 612-615 (6th Cir. 1990), *modified on reh'g*, 927 F.2d 904, *cert. denied*, 112 S. Ct. 406 (1991), held that obstetricians *were* capable of conspiring, because they *did compete* with the excluded nurse midwives, but that the pediatrician defendants were incapable of conspiring because they did not so compete ("when competing physicians are making privilege recommendations concerning another competitor, sufficient anticompetitive concerns are raised to warrant a conclusion that the members of the medical staff are not acting as agents of the hospital for purposes of applying the intracorporate conspiracy doctrine to preclude a conspiracy among staff members"). Similarly, in *Nanavati v. Burdette Tomlin Memorial Hospital*, 857 F.2d 96, 119 (3d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989) (cited in *Oksanen*,

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1846, 1849 (Scalia, J, dissenting) ("[t]his Court treats this case as involving ... a conspiracy among eye surgeons at Midway Hospital to eliminate one of their competitors"), although only the interstate commerce issue was addressed and decided.

945 F.2d at 703), the Third Circuit reaffirmed its holding in *Weiss* that *competing* physicians can conspire, but found that none of the medical staff committee members in *Nanavati* were cardiologists who could have had any competitive motivation for the plaintiff cardiologist's exclusion.

In *Oksanen*, bearing out its "functional" test of intracorporate conspiracy as to whether exclusion of *competition* was actually involved, the Fourth Circuit took pains to point out:

> This case is not one in which a representative of a class of competitors is being excluded from the market. *Cf. Oltz* (attempt to exclude nurse anesthetist); *Cooper* (attempt to exclude podiatrists); *Weiss* (attempt to exclude osteopath). Oksanen, as an individual competitor, may have been hurt by the hospital's decision to revoke his privileges, but there is no evidence that competition as a whole in the relevant market has been harmed.

945 F.2d at 709.[11]

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[11]The issue raised by petitioner here is whether his individual competitors, the staff M.D. respondents, can conspire among themselves, *not* whether the Hospital (not a defendant) is legally capable of conspiring *with* its staff M.D.s. The latter question was answered in the negative by *Oksanen*, 945 F.2d at 702-705; *Nurse Midwifery*, 918 F.2d at 614; *Nanavanti*, 857 F.2d at 118; and *Weiss*, 745 F.2d at 814; *contra Oltz*,

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But *this case* involves precisely that situation—the exclusion of *all* chiropractic competition from the

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861 F.2d at 1450; *Bolt v. Halifax Hosp. Med. Center*, 851 F.2d 1273, 1280 (11th Cir. 1988).

Another matter not at issue here concerns the effect of the ratification of the private M.D. respondents' adverse recommendation by the Wilkes Board of Trustees. *Pudlo v. Adamski supra*, though finding that the competing staff M.D.s could be independent conspirators, concluded that plaintiff nonetheless could have suffered no antitrust injury because "the Hospital's Governing Board retained ultimate responsibility for the decision of whether Pudlo's staff appointment would be terminated" for alleged malpractice, citing *Oksanen*, 945 F.2d at 706. Both *Pudlo* and *Oksanen*, however, involved M.D.s as to whom state law (N.C.G.S. § 131E-85(a)) clothes hospital boards with broad discretion whether to grant or deny privileges. Here the North Carolina Chiropractor Hospital Access Statutes negate the authority of both the Wilkes Hospital Board and the private M.D. staff respondents from blanket denial of all chiropractor privileges.

A finding by this Court that the private M.D. respondents were not immune because of the North Carolina Chiropractor Statutes would require the Fourth Circuit on remand to reconsider its analysis that respondents' "undue influence" over the Board (i.e., petitioner's privileges would likely have been granted but for the M.D.s' adverse recommendation) "is irrelevant once the determination is made that the municipality is acting as authorized within the clearly articulated state policy ... to decide which physicians are entitled to privileges." (10a-11a.) Otherwise, the mere rubber stamp of a hospital board which itself may be immune from antitrust liability under *Omni* would *ipso facto* immunize from antitrust scrutiny all other non-immune private anticompetitive activities excluding hospital users. Since the relevant state policy regarding chiropractors is to the contrary, applying the *Pudlo/Oksanen* rule to the Trustees' ratification here, or holding that a separate conspiracy by the staff M.D.s to "unduly influence" the board must be treated as a legally impossible conspiracy *between* the staff and the hospital, would violate "the well established principle that ' a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.'" *Omni*, 111 S. Ct. at 1353.

market for hospital services by higher priced, less effective M.D.s who control hospital access.[12] In direct contrast to *Oksanen*, *Nanavati*, and *Nurse Midwifery*, the record here indisputably showed that virtually all of the private M.D. defendants treat the same musculoskeletal disorders that chiropractors treat and are in direct competition with petitioner. Yet the Fourth Circuit inexplicably held, contrary to *Oksanen* itself, that the intracorporate conspiracy doctrine applies, even where the private M.D. "agents" or "employees" of the hospital *are* in direct competition with the excluded "representative of a class of competitors".

In *Oksanen*, 945 F.2d at 704, the Fourth Circuit sought to distinguish *Oltz v. St. Peter's Community Hospital*, 861 F.2d 1440, 1450 (9th Cir. 1988), as a case of actions undertaken "outside the peer review process" by anesthesiologists to exclude a lower cost nurse anesthetist. But whether antitrust violators perpetrate their conspiracy privately or under the aegis of some "official organization" is not the proper test of whether the violators had independent economic motives to conspire under § 1. And especially where, as in this case, an entire class of competitors is being excluded, "peer review" terminology is itself inapt. Petitioner had never previously been admitted to

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[12]The Fourth Circuit made no mention of the impact of excluding chiropractors on consumers, a factor deemed relevant in *White v. Rockingham Radiologists, Ltd.*, 820 F.2d 98, 105 (4th Cir. 1987).

practice in the Hospital, and his exclusion was not for reasons of any past "malpractice" or misconduct (as in *Oksanen*). Indeed, petitioner's qualifications as a competent and licensed chiropractor were never at issue in his exclusion. Respondents claimed only that admitting *any* chiropractor would lower the "quality of patient care" at the Hospital, a defense definitively rejected in *Wilk v. American Medical Ass'n supra.*

Copperweld held only, and not surprisingly, that parent and subsidiary corporations were a single entity for Sherman Act § 1 conspiracy/combination purposes. The Fourth Circuit has now expanded *Copperweld* to negate federal antitrust laws far beyond what this Court intended and far beyond what other courts since *Copperweld* have held.[13]

The potential ramifications of this new doctrine, outside as well as inside the hospital health services area, are not minor. If staff M.D.s at a hospital cannot legally "conspire", in § 1 terms, to exclude their competitors from hospital access, what would prevent small shop owners at a dominant local shopping mall, in the guise of a "Tenants Admission Association" "employed" by the mall's management, from excluding any lower pricing K-Mart or Walmart that wanted to become a new mall tenant? What would prevent the

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[13] *See, e.g., Tunis Bros. Co. v. Ford Motor Co.*, 763 F.2d 1482 (3d Cir. 1985), *vacated & remanded on other grounds*, 475 U.S. 1105 (1986) (antitrust); *Scott v. Township of Bristol*, 1990 U.S. Dist. Lexis 15313 at *25 (E.D. Pa.) (civil rights conspiracy); *cf. also Buschi v. Kirven*, 775 F.2d 1240, 1252 (4th Cir. 1985).

few airlines that already have landing rights at any major airport from having their "Landing Rights Committee", "employed" by the Airport Authority, exclude competing airlines that sought to obtain landing rights?[14] Under the Fourth Circuit's new intracorporate conspiracy doctrine, wherever our economic system requires some bottleneck "gatekeeper", the federal antitrust laws are now a dead letter which only this Court can revive.

III. EXCLUSIONARY AND ANTICOMPETITIVE PRACTICES IN THE HEALTH CARE INDUSTRY RAISE AN IMPORTANT ISSUE OF PUBLIC POLICY WHICH THE ANTITRUST LAWS SHOULD ADDRESS

The exclusion of chiropractors from hospital access involved in this case is the tip of an iceberg. Chiropractors are only one of many lower cost health provider groups subjected to the exclusionary practices of dominant M.D.s. Others include clinical psychologists, podiatrists, nurse practitioners, nurse midwives, nurse anesthetists, physical therapists, and medical technologists.[15] Petitioner does not suggest

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[14]This would be a clever arrangement indeed if the existing airlines were already fixing prices. *Cf. In re Domestic Air Transportation Antitrust Litig.*, 137 F.R.D. 677 (N.D. Ga. 1991).

[15]*See, e.g.*, Richards, "Nonphysician Practitioners Make Slow Headway on Staff Privileges," 58 *J. Am. Hosp. Ass'n* 82 (1984).

that hospital access for chiropractors alone, or for all of these "allied health professionals" combined, would instantly halt the out of control spiral in health care costs. But surely the potential is there for savings of billions of dollars annually, if the antitrust laws were made enforceable.

In the context of the consumer interests that the antitrust laws are designed to protect, exclusion of an entire class of competitors fundamentally distinguishes petitioner's case from the run-of-the-mill hospital privileges antitrust case pitting an excluded M.D. plaintiff against other staff M.D.s, many of which, as in *Oksanen*, may be improperly motivated by malpractice, misconduct, or other legitimate hospital considerations unrelated to the suppression of competition.

Government antitrust officials have echoed this theme. In a speech to the American Medical Association, Justice Department Antitrust Division head Charles F. Rule commented:

> Competition and the market discipline it generates are simply the last best hope to slow sky-rocketing health-care costs that endanger the prospects for universal health care and threaten to hemorrhage the federal deficit. The discipline of competition is also the best way to stave off the push for socialized medicine....
>
> Clear violations of the antitrust laws occur when otherwise competing professionals agree to do something, or to refrain from doing something, that blocks

> the free operation of the competitive process without any plausible promise of economic benefits for consumers.... "Naked" agreements of this kind—to fix prices, to allocate territories, or *to boycott competing health-care providers*—are unlawful regardless of their purpose and effect.[16]

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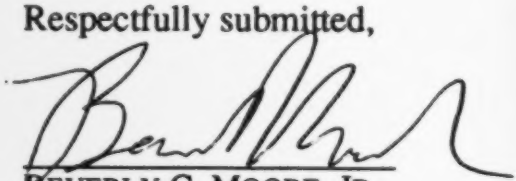
[16]Rule, Asst. Attorney General, Justice Dept., Antitrust Division, Speech Before the American Medical Ass'n, Dec. 6, 1988 at 2, 9 (emphasis added). Similarly, Federal Trade Commission Chairman Daniel Oliver, in a January 29, 1987 speech before the National Health Lawyers Association, reportedly pledged an FTC "fight against ... professional boycotts", including situations "both where physicians are pitted against physicians or non-physicians", as illustrated by FTC "'consent settlements in cases in which physicians had unreasonably denied hospital privileges to podiatrists for economic reasons unrelated to competence.' " *Oliver Promises FTC Will Fight For More Competition in Health Care Area*, Antitrust & Trade Reg. Rep. (BNA), No. 1301 at 211 (Feb. 5, 1987). In a speech before the same group in January 1989, M. Elizabeth Gee, then Assistant Director of the FTC Bureau of Competition's Health Care Division, condemned the "[u]se of the hospital privilege system by medical staffs to shield them from new competition from others." *NHLA Conferees Probe Pitfalls Facing Health Care Providers*, Antitrust & Trade Reg. Rep. (BNA), No. 1401 at 171 (Feb. 2, 1989). Ms. Gee now represents the respondents in this action. 3a.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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May 11, 1992

APPENDIX A

UNITED STATES COURT OF APPEAL
FOR THE FOURTH CIRCUIT
NO. 91-2502

R. Ernest COHN, D.C., D.A.B.C.O.,
Plaintiff-Appellant,

vs.

JOHN L. BOND; JOHN BENNETT; LARRY S. KILBY; KAROLEN C. BOWMAN; DONALD D. PETERSON; KIRK D. GULDEN; JOHN G. OLIVER; JAMES K. HARTYE; THOMAS K. McMAHAN; LEONARD A. BAUGHAM; MARK D. ANDREWS; J. THOMAS BOWMAN; DUANE H. SMITH; JERRY F. WATSON, Individually and as Members of the Medical Staff of Wilkes General Hospital,
Defendants-Appellees,

and

WILKES GENERAL HOSPITAL; ANDREW L. KILBY, Individually and as Chairman of the Board of Trustees; JOHN L. BOND, Individually and as Trustee of Wilkes General Hospital;

RALPH G. BUCHAN; NEIL G. CASHION, JR.; C. DENNIS FAW; GEORGE S. FORESTER, JR.; PAUL C. HOLBROOK; JOHN Q. MYERS; REX REEVES; ALVIN A. STURDIVANT, JR., Individually and as Trustees of Wilkes General Hospital; PHILLIP E. COMPEAU; WILLIAM L. BUNDY; JOHN Q. MYERS,

Defendants.

Appeal from the United States District Court for the Western District of North Carolina, at Statesville. Richard L. Voorhees, Chief District Judge. (CA-88-44-ST)

Argued: October 31, 1991
Decided: December 31, 1991

Before WIDENER and HAMILTON, Circuit Judges, and RESTANI, Judge, United States Court of International Trade, sitting by designation.

Affirmed by published opinion. Judge Hamilton wrote the opinion, in which Judge Widener and Judge Restani joined.

COUNSEL

ARGUED: Beverly C. Moore, Jr., MOORE & BROWN, Washington, D.C., for Appellant. M. Elizabeth Gee, WOMBLE, CARLYLE, SANDRIDGE & RICE, Winston-Salem, North Carolina, for Appellees. **ON BRIEF:** Sandra B. Brantley, MOORE & BROWN, Washington, D.C.; B. Ervin Brown, II, MOORE & BROWN, Winston-Salem, North Carolina, for Appellant. Roddey M. Ligon, Jr., WOMBLE, CARLYLE, SANDRIDGE & RICE, Winston-Salem, North Carolina; W. Harold Mitchell, MITCHELL, BLACKWELL & MITCHELL, Valdese, North Carolina; William Kearns Davis, James R. Fox, BELL, DAVIS & PITT, P.A., Winston-Salem, North Carolina, for Appellees.

OPINION

HAMILTON, Circuit Judge:

R. Ernest Cohn, a chiropractor, filed this case complaining that Wilkes General Hospital and its medical staff improperly denied his request for staff privileges in violation of Section 16 of the Clayton Act, 15 U.S.C. § 26 (1973); Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 (1973); and in violation of a North Carolina statute concerning access to public hospitals by chiropractors. N.C. Gen. Stat. § 90-153 (1991). Dr. Cohn appeals from an order of the United States District Court for the Western District of North Carolina granting summary judgment to John L. Bond and other members of the medical staff of Wilkes

General Hospital, and dismissing Dr. Cohn's state law claim. We find that the defendants' actions are shielded by operation of the Local Government Antitrust Act (LGAA), the State Action Doctrine and intracorporate immunity. The decision of the district court is hereby affirmed.

I.

Dr. Cohn practices in Wilkesboro, North Carolina. Wilkes Hospital is a municipally owned and operated hospital under the City of Wilkesboro. Dr. John Bond is the named defendant of the medical staff of Wilkes Hospital. Other members of the medical staff are also defendants in this action.

In 1984, Dr. Cohn applied for privileges at Wilkes Hospital. In accordance with Wilkes Hospital's by laws, the request was referred to the Medical Staff Credentials Committee for review. The Committee recommended to the Board of Trustees of Wilkes Hospital (the "Board") that Dr. Cohn's application be denied. Their expressed reasons for denial were that the medical doctors would be unable to supervise care given by a chiropractor, and that granting hospital privileges to a chiropractor may not be permitted by law in North Carolina. Dr. Cohn appealed this decision to the Medical Executive Committee. The Executive Committee noted that chiropractors were permitted to practice in public hospitals, but that a hospital is not required to admit them. The Executive Committee otherwise affirmed the decision of the Credentials Committee. Dr. Cohn appealed this decision to the

Board. On May 28, 1985, the Board met and heard testimony from Dr. Cohn. Thereafter, the Board went into closed executive session and decided to deny Dr. Cohn's request for privileges. The Board cited as ground for its decision: (1) concerns over the ability of medical staff to supervise Dr. Cohn, (2) a lack of requests for chiropractic care at Wilkes Hospital, (3) insurance concerns, (4) the absence of reasons why such services need to be administered in a hospital, (5) the lack of similar privileges to a chiropractor in other hospitals, and (6) a lack of knowledge necessary to monitor fees by chiropractors. After a subsequent request from Dr. Cohn for limited privileges, and a request for reconsideration of his initial application, the Board affirmed its earlier denial on July 22, 1986, and again on October 27, 1987.

Dr. Cohn's suit originally named Wilkes Hospital, members of the Board, and members of Wilkes Hospital's medical staff. The only parties remaining at the summary judgment stage were the Board and the medical staff members. Dr. Cohn dropped Wilkes Hospital as a party in his third amended complaint. (Complaint, J.A. at 173-182). Dr. Cohn appeals only the granting of summary judgment with respect to his causes of action against the medical staff. Dr. Cohn specifically notes in his brief that the Trustees (Board) are not involved in this appeal. (Appellant's Brief at 3, n.1).

The district court granted summary judgment on the grounds that the conduct challenged was immunized under the Local Government Antitrust Act, 15 U.S.C. § 34 (Supp. I 1984), and under the State Action Doctrine.

The district court also exercised its discretion to dismiss Dr. Cohn's pendant state claim, and denied Dr. Cohn's motion to reconsider the district court's earlier denial of a motion to compel discovery of certain Board meetings. The district court held that such meetings were privileged and not subject to discovery.

Dr. Cohn appeals, claiming that the district court erred in extending LGAA and State Action Doctrine immunity to the staff members who recommended that he be denied privileges at Wilkes Hospital. Dr. Cohn also appeals the district court's denial of discovery of the Board's proceedings in executive session. Lastly, he claims that the district court erred in that the state claim it dismissed was one he had already dropped, and that the district court never dismissed the actual state claim he was asserting.

II.

The appropriate standard of review for the granting of summary judgment is *de novo*. A decision of the trial court refusing to continue discovery is upheld absent an abuse of discretion. *Sandcrest Outpatient Services v. Cumberland City*, 853 F.2d 1139, 1148 (4th Cir. 1988).

III.

The LGAA provides immunity to any local government, official or employee acting in an official capacity from money damages in an antitrust case. 15 U.S.C. § 36. The appellant does not appeal the

determination by the district court that Wilkes Hospital is a local governmental unit covered by the LGAA. The LGAA also provides immunity to a person who is not an employee or official if that person is "engaged in 'official action directed by a government or official or employee thereof.' " *Sandcrest*, 853 F.2d at 1143 (quoting, 15 U.S.C. § 36(a)).

The facts in *Sandcrest* are similar to the facts in this case. In *Sandcrest*, the administrator declined to extend the emergency room service contract of Sandcrest Services. Sandcrest Services brought an antitrust action on the grounds that it was improperly excluded from providing services by the hospital, its board of trustees, the administration, and the medical staff. This court upheld the district court findings that the hospital, the administrator, and the medical staff committee were immune from such suits under the LGAA. This court held that the actions of the medical staff were "directed by" officials of the governmental entity, as contemplated by the LGAA. Whether actions are "directed by" an official, as contemplated by the LGAA, is determined by borrowing and applying the State Action Doctrine two prong test. *Sandcrest*, 853 F.2d at 1143, *citing* H.R. Conf. Rep. No. 1158, 98th Cong., 2d Sess. 3, *reprinted in* 1984 U.S.C.C.A.N. 4602, 4627.

In *Sandcrest*, the members of the medical staff were found to be immunized by the LGAA because their actions were "directed by officials." In light of our recent decision in *Oksanen v. Page Memorial Hospital*, 945 F.2d 733 (4th Cir. 1991), the medical staff's conduct in this case is more directly immune. *Oksanen*

holds that when members of the medical staff recommend action on an application for privileges, as authorized by the municipal hospital, they are acting in their capacity as employees, as opposed to private parties. *Id.* Physicians who make peer review decisions at the behest of, or by delegation from, the hospital's board of trustees, are acting as agents of the hospital and are, therefore, indistinguishable from the hospital.

In the instant case, the members of the medical staff acted as authorized by the staff bylaws and the Board. The medical staff members are, in making staff privilege recommendations, acting as agents of Wilkes Hospital. Therefore, their actions in this respect are entitled to immunity from money damages under the LGAA because of their unitary status with Wilkes Hospital.

IV.

The district court recognized that the determination that the defendants were immunized from money damages did not settle the question of whether injunctive relief was permitted. The LGAA does not extend its immunity to injunctive relief. "Both the House and the Senate ... were careful to observe that the immunity being provided to local government was immunity from suits for damages, and not immunity from suits seeking injunctive relief." *Sandcrest*, 853 F.2d at 1142 (4th Cir. 1988) (citing S. Rep. No. 593, 98th Cong., 2d Sess. 2 at 5-6 (1984)); H.R. Rep. No. 965, 98th Cong., 2d Sess. 2, *reprinted in* 1984 U.S.C.C.A.N. 4602, 4603. The district court correctly

held, however, that State Action Doctrine immunity precludes injunctive relief in this case. If an action falls within this doctrine, it is immunized from antitrust scrutiny. *Patrick v. Burget*, 486 U.S. 94 (1988).

The modern touchstone case of the State Action Doctrine is *Parker v. Brown*, 317 U.S. 341 (1943). In *Parker*, the Court declined to apply the Sherman Act to actions by a state. With respect to municipalities, the application of the doctrine was further explained in *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389, 413 (1978). *Lafayette* determined that a two prong test must be met before the action in that case was immunized. The first prong was that the action must be "one clearly articulated and affirmatively expressed as state policy." 435 U.S. at 410. The second prong that must be met is that the policy must be "actively supervised." *Id.* Because the *Lafayette* case involved a private party, some confusion remained as to whether a municipality was required to meet the second "active supervision" prong. The court made it clear in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985), that municipalities do not need to meet this second prong.

Wilkes Hospital is owned and operated by a municipality and the application of the second prong to the medical staff members depends on whether they are employees or private parties. As employees, their actions are judged by the first prong, as private parties, their actions are judged by both prongs.

As previously discussed, members of the medical staff acted as agents of Wilkes Hospital in making their recommendation to deny privileges. The second,

"active supervision" prong is, therefore, inapplicable in this case. With respect to the first prong, it is clear from this court's decision in *Coastal Neuro-Psych v. Onslow Memorial*, 795 F.2d 340 (4th cir. 1986), that "North Carolina statutes authorizing municipalities to construct, operate and maintain hospitals ... contemplate anticompetitive effects." *Id.* at 341 (citing N.C. Gen. Stat. §§ 131E-5, 131E-7(a)(6)). The decision in *Coastal Neuro-Psych* expressly indicated that this was true with respect to a municipal hospital's power to decide which physicians are entitled to privileges. 795 F.2d at 341. A municipal hospital's decision to deny privileges, therefore, meets the first prong of the *Parker* test. The actions of the staff are immune when, as is true here, they are acting as agents of Wilkes Hospital, a municipal hospital, in making their recommendation.

V.

Dr. Cohn contends that the medical staff exerted undue influence over the Board, thus supplanting the Board's decision. However, the medical staff in this case was acting in a manner similar to the medical staff in *Oksanen*. They were acting as agents of the hospital. *Oksanen* held that in such circumstances the doctrine of intracorporate immunity applies. This doctrine dictates that a single entity cannot conspire amongst itself. Since the medical staff and Wilkes Hospital, in these circumstances, are the same entity, undue influence is irrelevant. A single entity cannot unduly influence itself. Furthermore, the recent case of *Columbia v.*

Omni Outdoor Advertising, 111 S. Ct. 1344, 1353 (1991), leads us to conclude that undue influence is irrelevant once the determination is made that the municipality is acting as authorized within the clearly articulated state policy. "[A]ny action that qualifies as state action is 'ipso facto ... exempt from the operation of the antitrust laws.' " *Id.* (quoting *Hoover v. Ronwin*, 466 U.S. 558, 568 (1984)). We already determined that the Board's actions were so authorized and met the first prong of the *Lafayette* test. Relevant inquiry in this case ends with the finding that the first prong is met and the medical staff of Wilkes Hospital acted as authorized under a state policy meeting the requirements of the first prong. The presence of undue influence has no bearing on the finding that Wilkes Hospital and its staff are immune under the State Action Doctrine and the LGAA.

VI.

Since the actions of the staff were immunized under the LGAA and the State Action Doctrine, we need not consider whether it was appropriate to preclude discovery of the closed door sessions of the Board. Dr. Cohn seeks discovery of these proceedings to show further evidence of conspiracy among the staff and to show undue influence on the Board.

As previously noted, undue influence is irrelevant under the facts in this case. Because it is irrelevant, the denial of discovery to find evidence of undue influence is appropriate.

Any evidence of conspiracy among the staff in making its recommendation is similarly irrelevant. *Sandcrest*, 853 F.2d at 1146. Inquiry into the motives of the staff is not proper to determine if immunity exists. An allegation of conspiracy "is akin to an allegation that it was done in bad faith or with malice." *Id.* Such inquiries are clearly irrelevant in determining the application of the immunity. Furthermore, as this court discussed in *Oksanen*, conspiracy cannot be found where the medical staff and the hospital are essentially the same entity. Therefore, discovery with respect to evidence of a conspiracy is unnecessary.

Discovery should not become a "fishing expedition." *Sandcrest*, 853 F.2d at 1147. This is true particularly in this case in light of the underlying purposes of the LGAA and the State Action Doctrine, *i.e.*, to free local government from the fear of, and the dehabilitating effects of antitrust actions. *See id.* Discussions in the closed door sessions could only be relevant with respect to whether or not the immunities discussed above apply in these circumstances. There was sufficient information before the court to determine that the actions of the staff were immune. The refusal to allow continued discovery where it was unnecessary is not an abuse of discretion. *See Sandcrest*, 853 F.2d at 1148.

VII.

When the district court granted the defendants' motion for summary judgment on all federal claims, it exercised its discretion to dismiss the plaintiff's pendant state court claim. The district court

misidentified the state claim before it as an "unfair trade practices cause of action under N.C. Gen. Stat. § 75-1.1." The plaintiff dropped this cause of action in his third amended complaint. The claim actually before the district court was an alleged violation of N.C. Gen. Stat. § 90-153, which involves access to hospitals by chiropractors.

As this was the only state claim before the court, it is apparent that this claim was the state claim which the court intended to dismiss. This error was clearly inadvertent and was harmless. There is no contention that the district court would rule any differently on remand. The harmless error rule compels this court to exercise its judgment rather than result to automatic reversal. Under 28 U.S.C. § 2111 (1982), the misidentification of the state court claim is not grounds for remand or reversal.

We find that the medical staff's actions are immune from antitrust scrutiny by operation of the LGAA, the State Action Doctrine and intracorporate immunity. We further find that the district court's error in misidentifying the state court claim that it dismissed was harmless error.

AFFIRMED

APPENDIX B

IN THE DISTRICT COURT OF
THE UNITED STATES FOR
THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION

CIVIL NO. ST-C-88-44

R. Ernest COHN, D.C., D.A.B.C.O.,

Plaintiff,

vs.

WILKES GENERAL HOSPITAL; Andrew L. KILBY, Individually and as Chairman of the Board of Trustees; JOHN L. BOND, M.D., RALPH G. BUCHAN, NEIL G. CASHION, JR., C. DENNIS FAW, GEORGE S. FORESTER, JR., PAUL C. HOLBROOK, JOHN Q. MYERS; REX REEVES, and ALVIN A. STURDIVANT, JR., individually and as Trustees of Wilkes General Hospital; JOHN L. BOND, M.D., JOHN BENNETT, M.D., PHILLIP E. COMPEAU, M.D., LARRY S. KILBY, M.D., KAROLEN C. BOWMAN, M.D., DONALD D. PETERSON, M.D.,

KIRK D. GULDEN, M.D., JOHN G. OLIVER, M.D., JAMES K. HARTYE, M.D., THOMAS K. McMAHAN, M.D., LEONARD A. BAUGHAM, M.D., MARK D. ANDREWS, M.D., J. THOMAS BOWMAN, M.D., WILLIAM L. BUNDY, M.D., DUANE H. SMITH, M.D., JOHN Q. MYERS, M.D.,and JERRY F. WATSON, M.D., individually and as members of the Medical Staff of Wilkes General Hospital,

Defendants.

MEMORANDUM OF OPINION

This matter is before the Court for the determination of three motions. The Defendants have moved for summary judgment and for preclusion of thirty-six designated witnesses proposed to be used at trial by the Plaintiff. The Plaintiff has moved for reconsideration of that portion of this Court's Order of June 29, 1989, which denied Plaintiff's motion to compel discovery. The Plaintiff's motion for reconsideration will be denied for the same reasons stated in and supporting the Order of June 29, 1990. The Defendants' motion for summary judgment will be

granted, and the motion for preclusion will be declared moot.

I. PLAINTIFF'S MOTION FOR RECONSIDERATION

The Plaintiff has moved for this Court to reconsider that portion of its prior Order of June 29, 1989, which denied the Plaintiff's request to compel discovery of communications made during executive sessions of various meetings of the Wilkes General Hospital Board of Trustees. However, this Court still adheres to the reasoning expressed in its prior Order (*See Cohn v. Wilkes General Hospital*, 127 F.R.D. 117 (W.D.N.C. 1989)) and will deny the motion for reconsideration.

II. SUMMARY JUDGMENT

The Defendants have moved for summary judgment based upon immunity from antitrust claims, lack of an effect of the denial of hospital privileges on interstate commerce, and lack of a showing by the Plaintiff of a conspiracy among the Defendants. The Defendants contend that the Local Government Antitrust Act of 1984, 15 U.S.C. § 34 *et. seq.*, (hereinafter "LGAA") as well as recent decisions from the Fourth Circuit Court of appeals provide them with immunity from antitrust claims. The Plaintiff contends that the statute does not protect the "private physician Defendants" if they use their official capacities "as a cloak for advancing their private economic interests." Plaintiff's Opposition to Defendants Renewed Motion for Summary Judgment

filed November 21, 1989 at 4 (Pleading #95). The Plaintiff alleges that he seeks only injunctive relief against the "non-M.D. Board of Trustees Defendants" and that only the private physician Defendants will be required to pay damages, thus upholding the Congressional intent that municipal taxpayers not be required to pay antitrust damages. *Id.* at 5.

The contentions of the Plaintiff are not persuasive. The Fourth Circuit has recently given clear expression to the absolute immunity provided by the LGAA in a case remarkably similar to the present situation. *Sandcrest Outpatient Services, P.A. v. Cumberland County Hospital*, 853 F.2d 1139 (4th Cir. 1988). In *Sandcrest* the Fourth Circuit held that the immunity granted by the LGAA extended to a North Carolina county hospital's director, and members of the board of trustees, medical staff, and ad hoc committees. These Defendants had been sued in an antitrust action filed by an association of emergency room physicians whose contract with the hospital had been terminated. Nothing in the present case demonstrates that the reasoning of *Sandcrest* should not be followed.

The Plaintiff contends that under his allegations the individual doctors, unlike the *Sandcrest* defendants, improperly influenced the Board of Trustees in order to protect their professional interest. However, no evidence of improper persuasion has been presented in support of this claim. In addition, the Fourth Circuit itself noted:

> The LGAA makes no provision for consideration of a defendant's motives,

> and an allegation that an act was done pursuant to a conspiracy is akin to an allegation that it was done in bad faith or with malice. *Cf. Dorman v. Higgins*, 821 F.2d 133, 139 (2d Cir. 1987) (claim that a probation officer prepared a false presentence report was properly dismissed on grounds of immunity).

Sandcrest, supra, at 1146.

All that the Defendants need show in order to assert a valid claim of immunity from antitrust liability is that they acted in an official capacity or were directed by government officials or employees who were themselves acting in their official capacities.

> As previously discussed, these standards do not include a consideration of the defendant's intentions. The court considers only the objective questions: (i) whether, in light of the authority invested in a local government, its officials or employees, the actions complained of were lawful and taken within the scope of their authority, ... or (ii) whether, if the defendant is not a local government official or employee, the actions were directed by a local government or one of its officials or employees acting within the scope of his authority.

Sandcrest, supra, at 1148 (citations omitted).

Under the reasoning of *Sandcrest*, all of the Defendants have met the second prong of this test and are entitled to immunity under the LGAA for their actions in denying medical privileges to Dr. Cohn. (*See* N.C. Gen. Stat. § 131E-85(a), hospital's board of trustees authorized to make decision on grants, denials, and scope of privileges). While this determination resolves the question of liability on the part of the Defendants, it does not resolve the claim for injunctive relief raised by the Plaintiff.

Plaintiff seeks injunctive relief on the basis of alleged antitrust violations and unfair trade practices, pursuant to § 16 of the Clayton Act, 15 U.S.C. § 26, and N.C. Gen. Stat. § 75-1.1 respectively. Section 16 of the Clayton Act permits injunctive relief "against threatened loss or damage *by a violation of the antitrust laws*." 15 U.S.C. § 26 (emphasis added). As established above, Defendants are immune from antitrust liability and, therefore, cannot be said to have violated the antitrust laws in this situation. *Griffith v. Health Care Authority*, 705 F. Supp. 1489 (N.D. Ala. 1989) (immunity under LGAA extends to suits seeking injunctive relief). Furthermore, Plaintiff has failed to establish that the time-honored balance-of-hardships test tips decisively in his favor. *See, e.g., Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 1189 (4th Cir. 1977). Plaintiff is therefore not entitled to injunctive relief under his antitrust claims.

The grant of Defendants' motion for summary judgment extinguishes both Plaintiff's antitrust cause of action and the Court's federal subject matter jurisdiction over this matter. Plaintiff's unfair trade

practices cause of action under N.C. Gen. Stat. § 75-1.1 may therefore be, and hereby is, dismissed for want of pendent jurisdiction. *See Cooper v. Forsyth County Hosp. Auth., Inc.*, 789 F.2d 278, 280 n. 9 (4th Cir.), *cert. denied*, 479 U.S. 972 (1986). However, the Court notes that medical professionals are not contemplated by North Carolina's prohibition of unfair trade practices. *See, e.g.*, N.C. Gen. Stat. § 75-1.1(b) ("For purposes of this section, 'commerce' ... does not include professional services rendered by a member of a learned profession."); *Cameron v. New Hanover Memorial Hosp., Inc.*, 58 N.C. App. 414, 293 S.E.2d 901, *appeal dismissed & cert. denied*, 307 N.C. 127, 297 S.E.2d 399 (1982); Opinion of Attorney General to Representative Robert L. Farmer, 47 N.C.A.G. 118 (1977). That, plus the fact that a court should not substitute its judgment for that of the hospital board, precludes the Court from enjoining Defendants' exclusion of Plaintiff from the Wilkes Hospital facility. *Cameron.*

Furthermore, the Court notes that the judicially created "state action doctrine" provides immunity to state agencies from claims for antitrust injunctive relief, when their activities are directed by the legislature. *Parker v. Brown*, 317 U.S. 341, 350-51 (1943). This doctrine applies to a municipality when its actions are authorized by state law. *Hallie v. Eau Claire*, 471 U.S. 34 (1985). The Fourth Circuit has since applied this rule specifically to North Carolina municipal hospitals in *Coastal Neuro-Psychiatric Associates, P.A. v. Onslow Memorial Hosp., Inc.*, 795 F.2d 340 (4th Cir. 1986), and reasoned that North

Carolina contemplated "anticompetitive effects" in authorizing municipalities to construct, maintain, and operate hospitals pursuant to N.C. Gen. Stat. § 131E-5. *Coastal Neuro-Psychiatric Associates*, 795 F.2d at 341.

A hospital's governing body has statutory authority to make decisions concerning the scope and range of privileges that will be extended to physicians and others at the hospital. N.C. Gen. Stat. § 131E-85(a). The Court finds that the Defendants have demonstrated that "their anticompetitive activities were authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service' " and are therefore entitled to the "state action doctrine" immunity from antitrust injunctive relief. *Coastal Neuro-Psychiatric Associates*, 795 F.2d at 341 (quoting *Hallie*, 471 U.S. at 38-39). Hence, Defendants' motion for summary judgment will be granted as to all claims asserted by the Plaintiff.

III. PRECLUSION

Because summary judgment will be granted to the Defendants on all counts, the Defendants motion to preclude thirty-six witnesses from testifying at trial is moot.

A Judgment encompassing the findings herein will be filed contemporaneously herewith.

THIS the 11th day of March, 1991.

/s/Richard L. Voorhees
RICHARD L. VOORHEES, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE DISTRICT COURT OF
THE UNITED STATES FOR
THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION

CIVIL NO. ST-C-88-44

R. Ernest COHN, D.C., D.A.B.C.O.,

Plaintiff,

vs.

WILKES GENERAL HOSPITAL; Andrew L. KILBY, Individually and as Chairman of the Board of Trustees; JOHN L. BOND, M.D., RALPH G. BUCHAN, NEIL G. CASHION, JR., C. DENNIS FAW, GEORGE S. FORESTER, JR., PAUL C. HOLBROOK, JOHN Q. MYERS; REX REEVES, and ALVIN A. STURDIVANT, JR., individually and as Trustees of Wilkes General Hospital; JOHN L. BOND, M.D., JOHN BENNETT, M.D., PHILLIP E. COMPEAU, M.D., LARRY S. KILBY, M.D., KAROLEN C. BOWMAN, M.D., DONALD D. PETERSON, M.D, KIRK D. GULDEN, M.D., JOHN G. OLIVER, M.D., JAMES K. HARTYE,

M.D., THOMAS K. McMAHAN, M.D.,)
LEONARD A. BAUGHAM, M.D.,)
MARK D. ANDREWS, M.D.,)
J. THOMAS BOWMAN, M.D.,)
WILLIAM L. BUNDY, M.D.,)
DUANE H. SMITH, M.D., JOHN Q.)
MYERS, M.D.,and JERRY F.)
WATSON, M.D., individually and as)
members of the Medical Staff of Wilkes)
General Hospital,)
)
Defendants.)
)

JUDGMENT

For the reasons stated in the Memorandum of Opinion filed contemporaneously herewith,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. Plaintiff's motion for reconsideration of this Court's Order of June 29, 1990, is hereby DENIED;
2. Defendants' motion for summary judgment is hereby ALLOWED on all claims pursuant to 15 U.S.C. §§ 1 and 2 and such are DISMISSED on the merits;
3. Plaintiff's state claims for unfair trade practices pursuant to N.C. Gen. Stat. § 75-1.1 are DISMISSED for lack of jurisdiction; and
4. Plaintiff's motion for preclusion is hereby DISMISSED as moot.

THIS the 11th day of March, 1991.

/s/Richard L. Voorhees
RICHARD L. VOORHEES, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

UNITED STATES COURT OF APPEAL
FOR THE FOURTH CIRCUIT
NO. 91-2502
FILED: February 10, 1992

R. Ernest COHN, D.C., D.A.B.C.O.,
Plaintiff-Appellant,

vs.

JOHN L. BOND; JOHN BENNETT; LARRY S. KILBY; KAROLEN C. BOWMAN; DONALD D. PETERSON; KIRK D. GULDEN; JOHN G. OLIVER; JAMES K. HARTYE; THOMAS K. McMAHAN; LEONARD A. BAUGHAM; MARK D. ANDREWS; J. THOMAS BOWMAN; DUANE H. SMITH; JERRY F. WATSON, Individually and as Members of the Medical Staff of Wilkes General Hospital,
Defendants-Appellees,
and
WILKES GENERAL HOSPITAL; ANDREW L. KILBY, Individually and as Chairman of the Board of Trustees; JOHN L. BOND, Individually and as Trustee of Wilkes General Hospital; RALPH G. BUCHAN;

NEIL G. CASHION, JR.; C. DENNIS FAW; GEORGE S. FORESTER, JR.; PAUL C. HOLBROOK; JOHN Q. MYERS; REX REEVES; ALVIN A. STURDIVANT, JR., Individually and as Trustees of Wilke General Hospital; PHILLIP E. COMPEAU; WILLIAM L. BUNDY; JOHN Q. MYERS,
Defendants.

ON PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

Appellant filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Hamilton, with the concurrence of Judge Widener, and Judge Restani, Judge, United States Court of International Trade, sitting by designation.

For the Court,

/s/ John M. Greacen
Clerk